Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-1747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LAND FOR PEOPLE, INC., *Petitioner,*

v.

CECIL D. ANDRUS, et al., *Respondents,*

and

RICHARD CHAVARRIA, et al., *Intervenor-Respondents.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR THE INTERVENOR-RESPONDENTS.

STANLEY W. KRONICK
CLIFFORD W. SCHULZ
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
555 Capitol Mall, Suite 855
Sacramento, Calif. 95814

KENDALL L. MANOCK
GEORGE L. STRASSER
RALPH W. TARR
BAKER, MANOCK & JENSEN
Sixth Floor Security Bank
Fresno, California 93721

TED R. FRAME
FRAME & COURTNEY
P. O. Box 895
330 Coalinga Plaza
Coalinga, California 93210

ROBERT L. MCCARTY
MCCARTY & NOONE
490 L'Enfant Plaza East
Suite 3306
Washington, D.C. 20024

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

SUBJECT INDEX

	Pages
Opinion and Order Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Denying the Writ	5
Conclusion	12
Appendix	1a

TABLE OF AUTHORITIES CITED

Cases:

Acheson v. Droesse, 197 F.2d 574 (D.C. Cir. 1952) ... 12
County of Fresno v. Andrus, Dkt. Nos. 77-203-Civ. to 77-205-Civ., F-77-209-Civ., F-77-213-Civ. (E.D. Cal. 1977) 9, 10
DeFunis v. Odegaard, 416 U.S. 312 (1974) 7, 8, 9
Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971) .. 7
Harris Farms, Inc. v. Andrus, Dkt. No. F-78-49-Civ. (E.D. Cal.) 10
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958) 11
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 3
Preiser v. Newkirk, 422 U.S. 395 (1975) 5
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 3
Sullivan v. Meade Independent School District No. 101, 530 F.2d 799 (8th Cir. 1976) 9
United States v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977) 11
United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 4, 5, 11, 12
United States v. Phosphate Export Assn., 393 U.S. 199 (1968) 7

Page

United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976) 11
United States v. W.T. Grant Co., 345 U.S. 629 (1953) . 7
Warth v. Seldin, 422 U.S. 490 (1975) 3
Welch v. Simon, 498 F.2d 1060 (D.C. Cir. 1974) 12
Yellen v. Hickel, 352 F. Supp. 1300 (C.D. Cal. 1972) .. 11

STATUTES:

Administrative Procedure Act, 80 Stat. 383, 5 U.S.C. § 553 .....3, 5, 6, 10

Omnibus Adjustment Act of 1926, 44 Stat. 649, 43 U.S.C. § 423e 6, 11

Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431 ..4, 6, 11

28 U.S.C. § 1254(1) 2

CONSTITUTIONAL PROVISIONS:

Article III, Section 2 of the United States Constitution 5

OTHER AUTHORITIES:

H.R. 3420, 95th Congress 10
H.R. 12983, 95th Congress 10
H.R. 13350, 95th Congress 10
H.R. 13840, 95th Congress 10
S. 242, 95th Congress 10
S. 1812, 95th Congress 10
S. 2310, 95th Congress 10
S. 2606, 95th Congress 10
S. 2818, 95th Congress 10
"Reclamation Rules and Regulations For Acreage Limitation," 42 Federal Register 43044-49 (August 25, 1977) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1747

NATIONAL LAND FOR PEOPLE, INC., *Petitioner,*

v.

CECIL D. ANDRUS, et al., *Respondents,*

and

RICHARD CHAVARRIA, et al., *Intervenor-Respondents.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE INTERVENOR-RESPONDENTS IN OPPOSITION

Intervenor-Respondents respectfully urge that a writ of certiorari should not issue as requested by petitioner to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on January 20, 1978, because there are no special or important reasons supporting such review.

OPINION AND ORDERS BELOW

The order of the court of appeals of January 20, 1978, directing that the case be dismissed as moot (Pet. App. 16) is unreported, as is that court's order of October 21, 1977, directing the parties to show cause why the judgment of the district court should not be vacated and the case remanded with directions to dismiss the complaint as moot (Appendix 1 hereto). The order of the district court granting the plaintiff's motion for preliminary injunction (Pet. App. 18-19) and its subsequent order dismissing the case as moot (Pet. App. 17) are also unreported. The memorandum opinion of the district court (not contained in the petition) is reported at 417 F. Supp. 449.

JURISDICTION

The order of the court of appeals (Pet. App. 16) directing that the case be dismissed as moot was entered on January 20, 1978. On April 13, 1978, the Chief Justice signed an order extending the time in which to file a petition for a writ of certiorari to May 20, 1978. The petition was lodged with the Clerk on May 18, 1978, but held pending the submission of corrected copy which was accomplished June 15, 1978. Time was granted to and including August 15, 1978 in which to respond. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the court of appeals abuse its discretion by ordering dismissal of the case at bar in which the Federal respondents have fully complied with the first part of a preliminary injunction by instituting public rulemaking and have assured the court of appeals in writing that irrespective of whether or not the preliminary

injunction is upheld on appeal they will continue to comply with the second part of the injunction by not taking the action restrained until rulemaking is completed.

STATEMENT OF THE CASE

The petitioner, National Land for People, Inc. (NLP), commenced this action against the Secretary of the Interior and the Commissioner of Reclamation on May 25, 1976.

The major issue asserted was that the letters and memoranda of the Solicitor of the Department of Interior used in the administration of reclamation law constituted rules and regulations which had not been promulgated as required under the Administrative Procedure Act (APA).

NLP moved for a preliminary injunction requiring the Secretary to initiate public rule-making proceedings and restraining him from approving any excess land sales in the Westlands Water District until the Secretary had published proposed rules and finally promulgated such rules under the APA requirements (5 U.S.C. § 553). Richard Chavarria as a potential buyer, and other potential buyers and owners of excess lands in the Westlands Water District were permitted to intervene as defendants.

Major issues raised by the Federal defendants and the intervenors were that the public rule-making requirements of the APA were not applicable to Interior because of the public contract and public property exemptions, and that NLP lacked standing to sue under *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), *Warth* v. *Seldin,* 422 U.S. 490 (1975) and *Linda R. S.* v. *Richard D.,* 410 U.S.

614 (1973) and other recent holdings of this Court. A preliminary injunction nevertheless issued and both the United States and the Chavarria group appealed to the Court of Appeals for the District of Columbia Circuit.

While the case was on appeal, the Interior Department announced that rules and regulations covering excess lands would be promulgated. A motion was filed by the Federal defendants in the court of appeals on August 11, 1977, asking that their appeal be dismissed. In an order of the court of appeals issued *sua sponte* on September 9, 1977, the court noted:

> that the Secretary, on June 27, 1977, ordered a halt to approval of sales of excess lands under the Reclamation Act of 1902, as amended, pending the adoption of final regulations governing these sales. On August 25, 1977, the Secretary published proposed rules to govern sales of excess lands. The Secretary's announcement indicates that comments will be received until November 23, 1977, and that the Department of the Interior intends to proceed expeditiously.

Accordingly the court ordered the parties to submit memoranda on the question whether argument and consideration of the appeals should be deferred pending promulgation of the final rules.

Following consideration of the responses by the parties to the September 9 order, and "it appearing to the Court that a proper resolution in light of the memoranda of the parties would be to dismiss these actions as moot," the court of appeals on October 21, 1977, ordered the parties to show cause "if any there be" within fifteen days why the proceedings should not be dismissed, citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). (Appendix 1 hereto). After the parties responded the court of appeals issued its order of January 20, 1978, dismissing the appeals as moot and remanding for dismissal below. NLP now petitions for review of this action by writ of certiorari.

REASONS FOR DENYING THE WRIT

The Court Of Appeals For The District Of Columbia Circuit Acted In A Manner Thoroughly Consistent With Previous Decisions Of This Court And The Other United States Courts Of Appeals. That Action, Which Raises No Special Or Important Questions, Does Not Warrant Review On Certiorari.

Contrary to the contention of petitioner, the decision of the court of appeals in ordering dismissal of the appeal as moot and ordering the judgment of the district court vacated, is consistent with the decisions of this Court and is not in conflict with the decisions of any other circuit court of appeals. Therefore, there are no "special and important reasons" for granting review on writ of certiorari in this case.

Intervenor-respondents contend that there is at present no actual controversy in this case, as required by interpretations of article III, section 2 of the United States Constitution limiting the jurisdiction of Federal courts to "cases and controversies." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

The first part of the district court's preliminary injunction ordered:

> That defendants forthwith initiate public rulemaking proceedings in compliance with the Administrative Procedure Act, 5 U.S.C. 553, respecting the criteria and procedures to be used by the Bureau of Reclamation, Department of the Interior, to approve "excess lands" sales under the

federal reclamation laws, 43 U.S.C. 431, 43 U.S.C. 423e. . . .

On August 25, 1977, the Secretary of Interior initiated public rule-making by publishing proposed "Reclamation Rules and Regulations For Acreage Limitation" (Federal Register, Volume 42 No. 165, Thursday, August 25, 1977, pp. 43044-43049), thus complying with the first part of the injunction. Therefore, there is no actual controversy as to the first part of the order on appeal.

The second part of the district court's preliminary injunction of August 13, 1976, ordered:

> That Defendants be, and they hereby are enjoined from tentatively or finally approving under the federal reclamation laws any contracts or other proposals for sales of any "excess lands" in the Westlands Water District, San Joaquin Valley, California that are submitted to the Bureau of Reclamation on or after August 10, 1976, until the final completion of said public rule-making ordered to be initiated in subparagraph (A), *supra*, in compliance with the Administrative Procedure Act, or until further order of the Court. . . .

On January 27, 1977, the Secretary of Interior ordered a suspension of the approval of excess land sales in *all* Federal reclamation projects pending adoption of final regulations. This order exceeded the terms of the preliminary injunction in two ways. First, it referred to all Federal reclamation projects lands, not just those located in the Westlands Water District. Second, it referred to all excess land sales applications whether filed before or after August 10, 1976.

Consistent with the Secretary's order exceeding the terms of the injunction, in documents submitted to the

court of appeals, Federal respondents repeatedly assured the court that they did not intend to resume processing excess land sales applications until such time as the final rules and regulations had been promulgated. For example, in a document filed with the court on September 21, 1977, respondents stated:

> the Secretary has determined to exercise his legal authority to promulgate such rules and regulations *even if it should be determined that the district court erred in holding that he was required to do so.* Further, the Secretary does not intend to approve any "excess land" sales until after the final regulations are promulgated, *whether or not the district court's order suspending "excess lands" sales approvals is dissolved or modified.* [Emphasis added.]

Again, in a filing with the court of November 4, 1977, Federal respondents stated that:

> the Secretary is now firmly committed to promulgating final rules and regulations *irrespective of the outcome of the present appeals.* [Emphasis added.]

Based on these representations, the controlling decision, which has been ignored by petitioner,[1] is *DeFunis*

[1] Petitioner cites a series of cases (*United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); and *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971)) for the proposition that voluntary compliance is inadequate as a basis for a finding of mootness. These cases are not applicable to the present circumstances as discussed in *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974). In any event, petitioner has mischaracterized the decisions. This Court has qualified the general rule by pointing out that a "case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co., supra* at 633.

v. *Odegaard,* 416 U.S. 312 (1974). In *DeFunis* this Court held that the issue of the constitutionality of the preferential admissions policy of the University of Washington Law School had become moot due to the impending graduation of the plaintiff from the law school. This Court so concluded based upon the statements of counsel for the President of the University during oral argument before the Court that the plaintiff had registered for his final quarter in law school and that the law school would not in any way seek to abrogate the registration. The Court stated:

> The respondents have represented that, without regard to the ultimate resolution of the issues in this case, DeFunis will remain a student in the Law School for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and receive his degree from that institution. A determintion by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it.

DeFunis v. *Odegaard, supra* at 316-317.

With regard to the sufficiency of the representations this Court commented as follows:

> It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities. The respondents, through their counsel, the Attorney General of the

> State, *have professionally represented* that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been settled practice of the Court, in contexts nc less significant, fully to accept representations such as these as parameters for decision. [Citations.] [Emphasis added.]

DeFunis v. *Odegaard, supra* at 317. *See also Sullivan* v. *Meade Independent School District No. 101,* 530 F.2d 799, 808 (8th Cir. 1976).

In this case, the Secretary of the Interior, through the Department of Justice, counsel for respondents, has "professionally represented" to the court of appeals below, that respondents would not halt the rulemaking proceedings nor approve excess lands sales prior to the completion of the rulemaking. This assurance renders this case indistinguishable from *DeFunis.* As in *DeFunis,* petitioner here has been assured of obtaining all of the relief sought in its lawsuit. Action by this Court in the present case would no more affect whether excess lands sales applications will be considered and approved based on reclamation rules and regulations enacted pursuant to the APA than action by this Court in *DeFunis* would have affected whether *DeFunis* received his law degree.[3]

The preliminary injunction issued by the United States District Court for the Eastern District of California in *County of Fresno* v. *Andrus* (F-77-202-CIV,

---

[3] If this case were a voluntary compliance case, dismissal for mootness would still have been appropriate. The written professional representations of Federal respondents to the court of appeals were appropriate parameters for a decision that "there is no reasonable expectation that the wrong will be repeated."

F-77-203-CIV, F-77-204-CIV, F-77-205-CIV, F-77-209-CIV, and F-77-213-CIV) on December 7, 1977, enjoining the Bureau of Reclamation from continuing with rule-making proceedings pending the completion of an environmental impact statement, does not, as argued by petitioner, breathe life into this case. That decision was brought to the attention of the appeals court prior to its decision and the order requiring an EIS is merely a part of the rule-making process.

The filing of a lawsuit in the District Court for the Eastern District of California early this year (*Harris Farms, Inc.* v. *Andrus,* No. F-78-49-CIV), referred to by the petitioner, does not affect this case either. That action cannot change the representations made to the court of appeals in the present case.

Contrary to the assertion of petitioner this case is not one of "foremost public importance and interest." It involves only the question of compliance with the Administrative Procedure Act. The preliminary injunction of the District Court did not deal in any way with the substantive content of rules and regulations to be promulgated thereunder pursuant to the APA. It required only that the process of rulemaking be initiated. The substantive matters are now being considered in the legislative and administrative arenas.[3] Once the regulations promulgated pursuant to the APA have become final, with or without Congressional action, then the broad issues of Congressional intent may

[3] *See, e.g.*, in the 95th Congress S.2606, S.1812, S.242, S.2310, S.2818, H.R.13350, H.R.13840, H.R.12983, H.R.3420.

be appropriate for judicial determination.[4] No such issues, however, were before the courts below, nor are they here.

In all the circumstances, as indicated in *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 40 (1950), the court of appeals had a duty to vacate the judgment before it and remand with a direction to dismiss.[5] Such dispo-

[4] Thus whether the 160-acre limitation or the residency requirement contained in the Reclamation Act of 1902 (section 5, 43 U.S.C. § 431) is applicable to the sale of Federal reclamation project water pursuant to the terms of the 1926 Omnibus Adjustment Act (section 46, 43 U.S.C. § 423e) is immaterial to the consideration of the question now before this Court. While petitioner states at page 5 of its petition that Congress and the courts have consistently reaffirmed the so-called "residency requirement" of Federal reclamation law, such is not the fact. Intervenor-respondents contend that the "residency requirement" does not apply to lands in the Westlands Water District or other Federal reclamation projects lands within projects instituted after section 5 of the Reclamation Act of 1902 was modified by the Omnibus Adjustment Act of 1926, adding section 46 to the Federal reclamation laws. Section 46 is applicable to projects initiated after 1926. Neither *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958) nor *United States* v. *Tulare Lake Canal Co.,* 535 F.2d 1093 (9th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977), considered the applicability of the "residency requirement" contained in section 5 of the 1902 Act. The decision on this issue in *Yellen* v. *Hickel,* 352 F.Supp. 1300 (S.D.Cal. 1972), has been vacated on appeal in *United States* v. *Imperial Irrigation Dist.,* 559 F.2d 509 (9th Cir. 1977), because the plaintiffs raising that issue were held to be without standing to do so. Therefore, there is at present no pending decision of any court concerning the vitality of the "residency requirement" with regard to projects administered under section 46 of the Federal recelamation laws. As indicated in the text, however, this issue is not before this Court on the present petition and was not before the lower court.

[5] Federal defendants suggest in their Brief in Opposition to the present petition (p. 7, n.1) that an acceptable disposition of this case might be for this Court to order the court of appeals to hold

sition prevents the district court's decision, "unreviewable because of mootness, from spawning any legal consequences." *U.S.* v. *Munsingwear, Inc., supra* at 41; *see also Welch* v. *Simon,* 498 F.2d 1060, 1062 (D.C. Cir. 1974); *Acheson* v. *Droesse,* 197 F.2d 574, 577 (D.C.Cir. 1952).

CONCLUSION

There are no special or important reasons why this Court should exercise its sound discretion in favor of granting the present petition for review on writ of certiorari.

The decision of the court of appeals below ordering that this case be dismissed as moot for the reason that no actual controversy exists between the parties was based upon and consistent with prior decisions of this Court and is not in conflict with the decisions of any other circuit court of appeals.

---

these appeals in abeyance until final regulations are published. This alternative was fully briefed by the parties for the benefit of the court of appeals and intervenor-respondents strongly opposed it. Having considered this alternative in light of the factual circumstances before it, the court of appeals decided the appropriate course was to dismiss the appeals as moot. Intervenor-respondents support the court of appeals decision and continue to oppose strenuously holding these appeals in abeyance. Such disposition would be prejudicial to intervenor-respondents, who are entitled either to a hearing on the merits before the court of appeals or a dismissal of the appeals as moot, as ordered.

For the foregoing reasons intervenor-respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

KENDALL L. MANOCK
GEORGE L. STRASSER
RALPH W. TARR
BAKER, MANOCK & JENSEN
Sixth Floor Security Bank
Fresno, California 93721

ROBERT L. MCCARTY
MCCARTY & NOONE
490 L'Enfant Plaza East
Suite 3306
Washington, D.C. 20024

STANLEY W. KRONICK
CLIFFORD W. SCHULZ
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
555 Capitol Mall, Suite 855
Sacramento, Calif. 95814

TED R. FRAME
FRAME & COURTNEY
P. O. Box 895
330 Coalinga Plaza
Coalinga, California 93210

August 15, 1978

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil Action No. 76-0928

No. 76-2027

NATIONAL LAND FOR PEOPLE, INC., a non-profit corporation

v.

BUREAU OF RECLAMATION OF THE DEPARTMENT OF THE INTERIOR

RICHARD CHAVARRIA, et al., Appellants

No. 76-2028

NATIONAL LAND FOR PEOPLE, INC., a non-profit corporation

v.

BUREAU OF RECLAMATION OF THE DEPARTMENT OF THE INTERIOR, et al., Appellants

(FILED OCTOBER 21, 1977)

BEFORE: McGowan and Leventhal, Circuit Judges

Order

Upon consideration of appellants' motion to dismiss appeal in number 76-2028, of the responses thereto, and of the memoranda of the parties filed in response to this Court's order filed September 9, 1977 and it appearing to the Court that a proper resolution in light of the memoranda of the parties would be to dismiss these actions as moot, it is

ORDERED by the Court that counsel for the parties in the above consolidated cases are directed to show cause, if any there be, within 15 days from the date of this order why the judgment of the District Court on appeal herein should not be vacated and the case remanded with directions to dismiss the complaint as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Per Curiam